

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 UNITED STATES OF AMERICA,

4 | VS.

Criminal No. 13-270

5 ATIBA WARREN,
Defendant.

Transcript of Sentencing Proceedings on Thursday, August
8 25, 2016, United States District Court, Pittsburgh,
Pennsylvania, before Mark R. Hornak, District Judge.

10

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1 (Proceedings held in open court; Thursday, August 25, 2016.)

2 THE COURT: We're here this morning in the case of
3 the United States of America versus Mr. Atiba Warren, pending
4 on the docket of the Court at 13-CR- 270.

5 Will counsel for the United States please enter her
6 appearance.

7 MS. KING: Good morning, Your Honor, Katherine King
8 for the United States.

9 THE COURT: Good morning, Ms. King.

10 If the counsel for the defendant please enter his
11 appearance.

12 MR. SCHORR: Damien Schorr on behalf of Mr. Warren.

13 THE COURT: Who is seated with you at counsel table
14 today?

15 MR. SCHORR: Mr. Warren.

16 THE COURT: He's your client and he's the defendant
17 in this case.

18 MR. SCHORR: Yes, Your Honor.

19 THE COURT: Mr. Schorr, Ms. King, do either of you
20 have an objection if we handle today's hearing with everyone
21 keeping their seated at their seat at counsel table.

22 Ms. King, does that work for you?

23 MS. KING: Yes, Your Honor.

24 THE COURT: Mr. Schorr.

25 MR. SCHORR: Yes, Your Honor.

1 THE COURT: Mr. Warren, as we get started today,
2 there are a few questions I'm going to go over with you.
3 Before I do that, I'm going to ask my deputy to administer an
4 oath.

5 (Administration of the oath.)

6 THE COURT: Mr. Warren, as we get started today
7 there are a few things I'd like to go over and confirm for the
8 record, sir.

9 First is, you understand that we're here in federal
10 court today because this is the hearing at which time the Court
11 will set the sentence in your case?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Mr. Warren, just to confirm for the
14 record, you are represented by a lawyer, that lawyer is
15 Mr. Schorr and he is seated right next to you at that table.

16 Is that correct, sir?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Have you had enough time and opportunity
19 to talk about today's case and hearing with Mr. Schorr?

20 MR. WARREN: Yes, Your Honor.

21 THE COURT: Are you satisfied with the job
22 Mr. Schorr has done for you as your lawyer?

23 THE DEFENDANT: Very much so.

24 THE COURT: Let me ask you this, Mr. Warren. In the
25 last several weeks, have you treated with or received any type

1 of medical care from a doctor or any other type of health
2 person?

3 THE DEFENDANT: Yes.

4 THE COURT: Can you briefly describe what that was
5 for, sir.

6 THE DEFENDANT: Pain management because they don't
7 want to do the surgery. They have to go back in and then I
8 don't have a good leg to stand on, they were trying to wait to
9 see the outcome of the situation. Whatever I get done, I'll do
10 because the rehabilitation is going to be extensive.

11 THE COURT: Let me ask you this. SO this is for
12 your hip, sir?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Mr. Warren, let me ask you this. Are
15 you currently taking any type of prescribed or non-prescribed
16 medicine?

17 THE DEFENDANT: Yes.

18 THE COURT: Can you tell us what that is.

19 THE DEFENDANT: I'm not sure how to pronounce it.
20 The highest they could give me where I'm at, it begins with an
21 M. I'm not absolutely sure. I know it's an anti-inflammatory.
22 They're not allowed to prescribe pain narcotics or anything
23 like that, so they give me that, and basically that's it.

24 THE COURT: Let me ask you this, Mr. Warren, since
25 you have been taking this anti-inflammatory, have you ever

1 noticed that it got in the way of you understanding what is
2 going on around you?

3 THE DEFENDANT: No. It basically -- it just -- I
4 guess it helps some, but I don't -- it doesn't cloud my
5 judgment or anything.

6 THE COURT: You're not having any cloudy judgment or
7 difficulty this morning?

8 THE DEFENDANT: No.

9 THE COURT: Mr. Warren, lastly, in the last 24 hours
10 or so, have you had any alcohol or alcoholic beverages?

11 THE DEFENDANT: No, sir.

12 THE COURT: Appreciate that, Mr. Warren.

13 THE DEFENDANT: You're welcome.

14 THE COURT: Mr. Schorr, based on the information
15 available to you, sir, do you have any doubts as to Mr.
16 Warren's competence to participate in today's hearing?

17 MR. SCHORR: No, sir.

18 THE COURT: Ms. King, same question of you?

19 MS. KING: No, Your Honor.

20 THE COURT: Mr. Warren, based on your answers to my
21 questions, my observations here in court, the representations
22 of your lawyer and the lawyer for the United States, I find you
23 are competent to participate in today's hearing.

24 Mr. Schorr, and Ms. King, I'm confident you have
25 carefully reviewed, as has the Court, all the matters that are

1 on the docket that are relevant to today's proceeding.

2 I would like to highlight several of them for the
3 record.

4 On October 30, 2015, at the conclusion of a trial, a
5 jury delivered a unanimous verdict of guilty as to Count One of
6 the indictment in this case, charging a violation of Title 18
7 of the United States Code, Section 922(g)(1), possession of a
8 firearm by a convicted felon.

9 Thereafter, the probation department prepared and
10 made available in the usual course a presentence report on
11 January 29, 2016. I would note that the United States
12 Probation Officer Andrew Waszyn is present in the courtroom
13 today.

14 Thereafter, in a like fashion, the probation
15 department prepared and made available an addendum to that
16 presentence report on February 16, 2016.

17 The defendant, through his counsel, initially
18 Mr. Sindler and predominantly Mr. Schorr have filed a number of
19 memoranda position statements and other papers relative to
20 sentencing issues in this case on February 5th, May 11th, July
21 22nd, July 26th, July 27th, August 22nd and August 23rd of
22 2016.

23 Counsel for the government filed similar documents
24 on February 4th, February 12th, May 2nd, July 22nd, August
25 14th, and August 23rd, 2016.

1 The Court issued its tentative findings regarding
2 sentencing matters yesterday, August 24, 2016.

3 Ms. King, have you reviewed each of the documents
4 and materials to which I have made reference?

5 MS. KING: Yes, Your Honor.

6 THE COURT: Mr. Schorr, have you done likewise and
7 have you also reviewed them with your client, Mr. Warren?

8 MR. SCHORR: Yes, sir.

9 THE COURT: Mr. Warren, just to confirm for the
10 record, has your lawyer, Mr. Schorr, reviewed all of those
11 papers with you and in particular, the presentence report and
12 the addendum to it?

13 THE DEFENDANT: Yes.

14 THE COURT: Mr. Warren, let me step back from that
15 question.

16 Ms. King, as I understand it, and Mr. Schorr, I'll
17 be asking you the same question in a moment, the offense of
18 conviction in this case, in the circumstances which the Court
19 has tentatively ruled in its findings and conclusions carries
20 with it a mandatory minimum sentence of imprisonment of 180
21 months.

22 Is that correct, Ms. King?

23 MS. KING: Yes, Your Honor.

24 THE COURT: Do you agree with that, Mr. Schorr?

25 MR. SCHORR: Yes, if he qualifies as an armed career

1 criminal.

2 THE COURT: I understand.

3 Mr. Warren, and we're going to go over this in a
4 little more detail in a few minutes. By statute, that is, by
5 law passed by Congress and signed into law by the President
6 some time ago, there's a mandatory minimum term of imprisonment
7 in your case, the Court has ruled, and we'll hear from counsel
8 to the extent they want to raise further issues today, but I've
9 initially ruled that there is a mandatory minimum term of
10 imprisonment in your case of 15 years, or 180 months.

11 Even though that is in the Court's estimation the
12 case, I'm still obligated to calculate and consider the
13 advisory sentencing guidelines that are published by the United
14 States Sentencing Commission. We're going to talk about that
15 in a little more in a moment.

16 I would confirm for the record that as to the
17 sentencing guidelines, the guidelines themselves have been
18 declared by decisions of the U.S. Supreme Court to be advisory
19 on the Court. The guidelines themselves are no longer
20 mandatory and a sentencing court may not presume or take for
21 granted that an advisory guideline range or a particular
22 guideline sentence is reasonable or applicable in a given case,
23 subject to the application of any mandatory statutory
24 requirement. Therefore, the advisory guidelines themselves are
25 not only no longer mandatory, they're not presumed to be

1 reasonable in a given case.

2 Ms. King, is there an identifiable victim in this
3 case for whom notice of today's hearing was required to be
4 given and if so, has such notice been given?

5 MS. KING: There was no victim, Your Honor.

6 THE COURT: Thank you, Ms. King.

7 I would confirm to counsel and to you, Mr. Warren,
8 that I've reviewed the complete file and the docket in this
9 case, that includes but is not limited to the presentence
10 report, the addendum, each and every paper regarding any
11 sentencing matter that has been filed by your lawyer,
12 Mr. Warren, or by Ms. King on behalf of the United States, the
13 letters that were submitted regarding sentencing matters by
14 your lawyer, Mr. Schorr, along with the recommendation of the
15 U.S. Probation Office.

16 I would confirm and order that under Federal Rule of
17 Criminal Procedure, 32(e)(3), that recommendation is not
18 disclosed to counsel for the United States, to the defendant,
19 or to the defendant's lawyer, but I would also confirm for the
20 record that in determining the sentence in this case, I have
21 not considered and will not consider any factual or legal
22 matter that has not been disclosed to all of the lawyers and to
23 you, Mr. Warren.

24 Mr. Schorr, I note in your sentencing memorandum,
25 and I've addressed this in the tentative findings that were

1 issued by the Court, you've requested the application and I
2 have tentatively ruled on the application of two departure
3 provisions under the now advisory guidelines, specifically, the
4 provisions contained at Section 5H1.4 and Section 5H1.2 of the
5 advisory guidelines.

6 Am I correct, Mr. Schorr?

7 MR. SCHORR: Yes, sir.

8 THE COURT: Do you have any other motions for
9 departure under the sentencing guidelines that the Court should
10 rule on at today's hearing?

11 MR. SCHORR: No.

12 THE COURT: Ms. King, does the United States have
13 any motions for a formal departure, as that term is used under
14 the now advisory sentencing guidelines?

15 MS. KING: No, Your Honor.

16 THE COURT: Ms. King, as we discussed, pursuant to
17 federal law based on the Court's tentative rulings and the
18 matters set forth in the presentence report and addendum, the
19 Court has tentatively ruled that by statute, there's a
20 mandatory minimum sentence in this case of 15 years.

21 Is that correct?

22 MS. KING: Yes.

23 THE COURT: There are on the record and I've recited
24 the dates of each of the entries on the docket of the position
25 statements regarding sentencing matters in this case which

1 principally address the application of the statutory Armed
2 Career Criminal Act sentencing provisions to Mr. Warren and to
3 his case. The objection that Mr. Warren, through counsel, had
4 made to the assessment of criminal history points is set forth
5 at Paragraph 25 of the presentence report, which the Court has
6 ruled that those points would not be assessed, along with the
7 two departures that I have noted and were addressed in the
8 Court's tentative findings, and what appeared to be an
9 objection in a sentencing memoranda filed by Mr. Warren's prior
10 counsel, Mr. Sindler, regarding the recitation of certain
11 matters in the presentence report regarding Mr. Warren's mental
12 and emotional health, and I ruled on each of those.

13 At this time, Mr. Schorr, I'll hear from you on any
14 other matters regarding the calculation of the now advisory
15 guidelines and the sentencing factors.

16 We'll hear from Ms. King, and neither counsel should
17 be concerned that the Court is going to call them to task, if
18 you will, if you address a certain matter more than once.
19 We'll handle any legal rulings, guideline rulings at this
20 point. I understand some of those matters may also relate to
21 issues that would come up in discussion of the general
22 sentencing factors under 3553(a), no one need be concerned that
23 if you said -- you can only say it in one place or another. I
24 recognize there is some overlap and I don't intend to impair
25 any presentation that either counsel wants to make on the case.

1 So, I thought procedurally, what we would do is hear
2 from Mr. Schorr and Ms. King on any of the legal matters, if
3 you will. When that portion of today's proceedings is
4 concluded, we'll then hear from Mr. Schorr on the 3553(a) and
5 any other factors he believes the Court should consider
6 relative to sentencing.

7 When Mr. Schorr tells me he's done with that, I'll
8 then address Mr. Warren personally and directly and give him an
9 opportunity to tell the Court anything, literally anything at
10 all he wants me to know about him, his case, or anything else
11 that he wants me to be aware of.

12 And then, Ms. King, the floor will be yours, again,
13 for anything relative to sentencing or sentencing matters the
14 United States wants to bring to the Court's attention.

15 And then, of course, we'll make sure that both
16 Ms. King and Mr. Schorr have a final opportunity to tell the
17 Court anything they think has not yet been addressed.

18 With that, Mr. Schorr, the floor is yours.

19 MR. SCHORR: Before, Your Honor, I start discussing
20 sentencing factors, I want to ask for one thing so I don't
21 forget it at the end. This case started out as a state court
22 case. Mr. Warren was detained by local law enforcement in
23 Allegheny County for several months before the federal
24 government picked this case up.

25 Subsequently, it's my understanding that the state

1 court case was dropped, and I'm asking you to put in your
2 judgment that the time he spent in state custody be applied to
3 his federal sentence. The Bureau of Prisons has to calculate
4 that, but they have to know that that state court case was
5 dropped. Otherwise, they will not credit that time.

6 THE COURT: And was adopted here. You're saying
7 there is no distinction between the prosecution that started as
8 a state prosecution, it was fully adopted, which led to our
9 proceeding here, and then the state charges were dismissed.

10 MR. SCHORR: Right, but he did spend time in state
11 custody, which has to be applied to his federal sentence. I
12 want to make sure that is taken care of.

13 THE COURT: Ms. King, does the United States have
14 any position in those regards?

15 MS. KING: I believe that's up to the Bureau of
16 Prisons to make that determination, Your Honor. He was not in
17 consistent custody as well. He made his bond or whatever in
18 state court and was picked up here federally, so I don't know
19 how they do that. I have no objection to alerting them to that
20 fact.

21 THE COURT: Mr. Schorr, at minimum, you want to make
22 sure that the sentencing judgment alerts the marshal service
23 and the BOP of those facts so they can fully explore them and
24 make sure they're considered?

25 MR. SCHORR: Yes. I had asked his previous counsel

1 for information concerning how much time he spent in custody
2 and he didn't have a chance to get it to me. I didn't get a
3 chance to go into the state system to find out.

4 THE COURT: Understood.

5 I will put that in the sentencing judgment
6 affirmatively and directly so that the Bureau of Prisons is
7 alerted to it.

8 MR. SCHORR: Thank you.

9 Now, as far as the sentencing factors are concerned,
10 you're also talking about your tentative findings and
11 conclusions, I can discuss those now.

12 THE COURT: Absolutely.

13 MR. SCHORR: First, I want to object. Concerning
14 the Maryland robbery conviction, you're applying the wrong
15 statute. That Maryland statute was not in effect at the time
16 of his conviction and it's not the same statute. So, I object
17 on that ground. This analysis is based on the wrong statute.

18 I know you relied on the Moore case from the
19 District of Columbia, but that's a different case. That
20 defendant was not convicted in 2002, as I recall. So, my first
21 objection is the analysis is wrong because it's using the wrong
22 statute.

23 THE COURT: So which statute do you believe I should
24 have used?

25 MR. SCHORR: Article 27, Section 486 or 488.

1 THE COURT: Are you sure that's not referencing the
2 heroin conviction?

3 MR. SCHORR: No, it's from 2002 -- I know Ms. King
4 gave it to us multiple times. It might be the Maryland
5 conviction, but it is one of the -- the statute did change.

6 THE COURT: It was codified at the sections that are
7 recited both in my tentative findings and as reflected in the
8 Moore case.

9 MR. SCHORR: I understand that. But 486 defines
10 robbery, and 488, I think, was the enhancement. And I think
11 the language is different, Your Honor.

12 THE COURT: Ms. King?

13 MS. KING: Yes, Your Honor.

14 I did notice this as well. I don't think that the
15 Court's findings are inconsistent with the statute, but this is
16 what I know.

17 The defendant was charged in 2000 under Article 27,
18 Section 486, 87 and 88, I believe. It was robbery, and then
19 487 is armed robbery, and 488 I believe tells the prosecution
20 how to write up the charges.

21 THE COURT: Repeat that again, Article 27, Sections
22 486 --

23 MS. KING: I think 487 is the one that is the armed
24 robbery conviction. I have one copy here. I have provided it
25 at some filing, but I can hand it up to the Court if you like.

1 I'll show Mr. Schorr first.

2 Your Honor, on October 1, 2002, the State of
3 Maryland repealed all of their -- the majority of their
4 criminal laws and instituted a new set of criminal laws, which
5 is the one that the Court cited in its tentative findings,
6 Maryland Criminal Law Section 3-403. That was in effect as of
7 October 1, 2002.

8 The defendant pled guilty and was sentenced on
9 October 7, 2002. I don't know what that does in terms of the
10 fact that he was originally charged under the old statute, then
11 pled and sentenced under the new statute, but at the time the
12 new statute was adopted, it was basically verbatim of what you
13 have there, Your Honor. The statute that Your Honor cited in
14 the tentative findings and rulings is the version of the
15 statute that was amended in 2005. That version --

16 THE COURT: Which, among other things, added
17 subsection (b) regarding the use of a written instrument
18 alleging the presence of a dangerous weapon.

19 MS. KING: Yes. So what is cited in Your Honor's
20 tentative findings, I believe, reads exactly the same as the
21 statute under which the defendant was convicted, except for the
22 addition of that ability to commit the crime via presenting a
23 written instrument.

24 But Your Honor did note in a footnote that
25 regardless of the addition or not of that section, the crime of

1 committing -- the crime of robbery with a deadly, dangerous
2 weapon is categorically a crime of violence, which is the
3 government's position. I believe that that is the correct
4 analysis. So, the Maryland courts have said in many decisions,
5 some of which I believe I've cited in some of my sentencing
6 papers, that when the law was changed in 2002, it was adopted
7 without change.

8 I did print out, and I can give to Mr. Schorr the
9 Maryland 2002 session law which did revise and recodify first
10 repealed Article 27 and then put into place the new law. So, I
11 have the original article -- I'm sorry, Maryland Criminal Law
12 Section 3-403, which would have been in place on the day that
13 he was sentenced, but, again, it's -- as the Court can see,
14 it's the same language as the Court cited in its tentative
15 findings, except it did not have the addition of the written
16 instrument. So I can hand this up if that's at all useful.
17 But I do believe the Court's recognition that categorically
18 this is a crime of violence is the correct analysis.

19 MR. SCHORR: I appreciate the government had to go
20 to extensive efforts to try to find the statute in question.
21 However, you cannot arrest a man in 2000 and convict him of a
22 crime that was passed in 2002. You have to look at the offense
23 as it is worded at the time of the arrest.

24 THE COURT: That means we may not finish the
25 sentencing hearing today. I understand, Mr. Schorr.

1 MR. SCHORR: Now, I'm objecting from that
2 standpoint, that we're using the wrong statute.

3 THE COURT: So the statute that was in effect at the
4 time Mr. Warren was charged by criminal information with three
5 counts of robbery with a dangerous or deadly weapon was Article
6 27, Section 487 of the Annotated Code of Maryland, that was in
7 force at that time, which as Subsection 8 proscribes and
8 states: A person may not commit or attempt to commit a robbery
9 under Section 486 of this subheading with a dangerous or deadly
10 weapon and provides at subsection (b), a person who violates
11 this section is guilty of a felony and on conviction is subject
12 to imprisonment not exceeding 20 years.

13 That was the statute in place on the day the actions
14 that are the basis of the criminal information charging
15 Mr. Warren in three separate charges was in place.

16 MR. SCHORR: I believe so.

17 MS. KING: Your Honor, if I may, back at the May
18 hearing, I had introduced those exhibits, so the Court should
19 have them as exhibits. I'm looking 1, 2, and 6, and I laid out
20 kind of what Mr. Schorr and I were just discussing relative to
21 where he was convicted. I think the Court should still have
22 those probably.

23 THE COURT: Okay. Appreciate that.

24 Mr. Schorr.

25 MR. SCHORR: Now, to that end, you had asked me

1 to -- the Moore case, and in front of the District of Columbia,
2 which is United States versus Moore, 149 F.Supp.3d 177 (2016),
3 which I believe was decided in May of this year, the issue
4 here -- I looked at your tentative findings, I don't really see
5 where you addressed it, I could be totally wrong. Moore
6 creates a crime that does not exist. Moore took an enhancement
7 and made it an element, and nowhere in Apprendi or the Alleyne
8 case, A-L-L-E-Y-N-E, did I find any authority for a federal
9 court to have the ability to go in and alter state laws solely
10 for sentencing purposes. That is what happens here. You're
11 saying the Moore court said that the use of a dangerous or
12 deadly weapon is an element and it is not in Maryland law.

13 Now, I cited the Eldridge case in my pleading that I
14 filed, I think at Document 197 --

15 THE COURT: Wasn't Judge Bates' point that in order
16 to be convicted, the government, the State of Maryland would
17 have to prove beyond a reasonable doubt that the actor used a
18 dangerous or deadly weapon to commit the robbery. There could
19 be no conviction under the section I cited in my tentative
20 findings or under 487 unless the state proved beyond a
21 reasonable doubt that, first, there was either the commission
22 or attempted commission of a robbery, and that it was with a
23 dangerous or deadly weapon.

24 MR. SCHORR: That does not make it an element. In
25 Maryland, the courts have said it's an enhancement. You have

1 to respect Maryland law. The federal courts cannot come in and
2 say, Maryland courts got this wrong. That is what Judge Bates
3 did, essentially, what he has done. It is not an element.
4 When you're looking at whether this is a crime of violence, you
5 have to look at what are the elements of the crime. And the
6 elements of the crime of robbery do not have dangerous or
7 deadly weapon included in them in Maryland and Maryland courts
8 have not ever treated it that way. It is a sentencing
9 enhancement.

10 The cynical side of me says that Judge Bates wanted
11 to reach a certain conclusion and he made sure he got there,
12 but it is an enhancement, not an element. That is what you
13 have to look at when deciding whether this is a predicate
14 offense for the Armed Career Criminal Act.

15 THE COURT: What do you do with the reality that
16 under 27-487 it is listed as a crime, robbery with a dangerous
17 or deadly weapon.

18 MR. SCHORR: What does it say?

19 THE COURT: It says a person -- it is entitled
20 Robbery With Dangerous or Deadly Weapon. A person may not
21 commit or attempt to commit a robbery under Section 486 of this
22 subheading with a dangerous or deadly weapon.

23 MR. SCHORR: What does 486 define robbery as?

24 THE COURT: I don't have that in front of me.

25 MR. SCHORR: I don't have it verbatim off the top of

1 my head, but it says it's judicially --

2 THE COURT: Right, it's the common law meaning.

3 MR. SCHORR: You have to look at Maryland courts to
4 see what they say robbery is. Their definition of robbery is
5 far broader than the generic definition.

6 THE COURT: This crime, 487, is committing that
7 robbery with a dangerous or deadly weapon. If you're charged
8 under 487, you can't be convicted unless there's proof beyond a
9 reasonable doubt of a dangerous or deadly weapon, correct?

10 MR. SCHORR: My position is 487 is not a crime. 487
11 is an enhancement. The crime is robbery. The crime is robbery
12 under Section 486 where the defendant happens to have used a
13 dangerous or deadly weapon. 487 is not a separate crime and
14 Maryland courts have said that. You cannot deny that.

15 THE COURT: I'm not admitting or denying anything,
16 Mr. Schorr.

17 MR. SCHORR: I don't mean to be insolent.

18 THE COURT: You're not being insolent, you are being
19 interrogating, but that's a different thing.

20 MR. SCHORR: Maryland courts have clearly said it is
21 not a separate offense. And I know it's hard to wrap your head
22 around, when you read it, you say give me a break, but that is
23 what the courts have said.

24 THE COURT: I'm not saying, oh, give me a break.
25 I'm reading the statute that says a person may not commit or

1 attempt to commit a robbery under Section 486 of this
2 subheading with a dangerous or deadly weapon. That proscribes
3 conduct. For instance, it does not read, if any person should
4 commit a robbery under 486 with a dangerous or deadly weapon,
5 the sentence is enhanced to X. It proscribes conduct. And
6 then it says a person who violates this section is guilty of a
7 felony. Not a person who violates 486 using a deadly weapon,
8 it says a person who violates this section is guilty of a
9 felony.

10 MR. SCHORR: That may be how Judge Bates and you are
11 interpreting it, but can you show me a Maryland case from a
12 Maryland court that interprets it that way? I don't think you
13 can because I couldn't find one. I have spent a lot of time
14 looking at this. There is no Maryland authority for that
15 position. Maryland courts are the final arbitrator of Maryland
16 law, not the District of Columbia, not here in the Western
17 District of Pennsylvania, it's Maryland, what Maryland says,
18 and Maryland has said this is not a separate crime.

19 THE COURT: Ms. King, what do you say about that?

20 MS. KING: I disagree with that. This is a separate
21 crime. As the Court was saying, as the Court said in its
22 tentative findings, a defendant could not be convicted of
23 robbery with a deadly or dangerous weapon if that particular
24 fact was not found beyond a reasonable doubt by a jury.

25 THE COURT: Or conceded.

1 MS. KING: Or conceded.

2 After Apprendi, it is clear, and also, that would
3 increase the maximum penalty by five years. So, it's not just
4 a sentencing enhancement, it's not as though within a statutory
5 maximum of ten years your sentence can be enhanced up to ten
6 years if you have committed this crime with a deadly or
7 dangerous weapon, it enhances it beyond the statutory maximum
8 which, according to Apprendi, makes it, therefore, an element.
9 So this is something that would have to be found by a jury
10 beyond a reasonable doubt. It makes it a separate crime. So I
11 just don't see the defendant's point.

12 I have also done a survey of Maryland law and I
13 cannot find a case, I cannot find a case where someone was
14 charged with a crime of simple robbery and then at sentencing,
15 the court enhanced the penalty because the court found that a
16 dangerous or deadly weapon was used. Because that's not how it
17 is, you're charged with either simple robbery or you're charged
18 with the crime of robbery with a deadly and dangerous weapon
19 and that's how the case proceeds.

20 THE COURT: Certainly post-Apprendi, if a Maryland
21 state judge, without the consent of the defendant, added to the
22 maximum sentence based on a judicially found fact that a deadly
23 or dangerous weapon was used, that would be reversed on
24 constitutional grounds.

25 MS. KING: Yes, Your Honor, but this case is

1 post-Apprendi. Even pre-Apprendi, I couldn't find such a case.
2 It just didn't happen in Maryland. The defendant was charged
3 with whatever the crime was that he committed and was charged
4 as such in the charging document and that was the case that was
5 presented to the court. So I looked both pre, obviously,
6 post-Apprendi that would not usually happen in the usual
7 course, but this is not a pre-Apprendi case we're talking
8 about, it's post-Apprendi. So, all the elements of robbery
9 with a deadly and dangerous weapon had to be either found by a
10 jury or conceded by the defendant in the court below. Here, he
11 pleaded guilty to that crime. So, I just don't see the point
12 that Mr. Schorr is making.

13 Here, in federal court --

14 THE COURT: I think the point he's making -- let me
15 make sure I understand it.

16 You're saying, Mr. Schorr, that as a matter of law,
17 a matter of Maryland law, which is binding as a matter of
18 federal law, there is no crime in Maryland which has as an
19 element of the crime the use of a dangerous or deadly weapon in
20 the course of a robbery?

21 MR. SCHORR: That's my position, yes. That's what
22 Maryland courts have said. I'm not quite sure what date
23 Apprendi was decided.

24 MS. KING: It was decided in 2000, so at the time
25 this defendant was convicted, Apprendi applied to him.

1 MR. SCHORR: Convicted.

2 MS. KING: Yes, Apprendi would apply to him because
3 you wouldn't want it to not apply to him.

4 MR. SCHORR: I disagree. Why are we talking about
5 Apprendi if he was arrested in 2000? When was Apprendi decided
6 in 2000, before --

7 MS. KING: That doesn't matter because he was
8 convicted in 2002. Apprendi is beneficial to the defendant, so
9 he's not going to waive his Apprendi rights, in my opinion.

10 THE COURT: If he was charged prior to Apprendi, but
11 at the time of the trial and certainly at sentencing, I think
12 at least one portion, one consequence of Apprendi is that a
13 state or federal judge cannot apply -- cannot increase a
14 sentence based on anything other than a certified judgment of a
15 prior conviction. That's the one exception as I understand it
16 to Apprendi. A sentence cannot be increased, the statutory
17 maximum cannot be increased without proof of the necessary
18 requirements beyond a reasonable doubt.

19 MR. SCHORR: Your Honor, my understanding when I
20 read the government's pleading on this one, I forgot which one
21 it was in --

22 MS. KING: I think it was in Document 190.

23 MR. SCHORR: I think they're relying on Apprendi to
24 say that this creates an element.

25 Am I correct?

1 MS. KING: Yes, and I believe --

2 MR. SCHORR: How can Apprendi -- where is the
3 authority that says Apprendi can take an enhancement and turn
4 it into an element?

5 MS. KING: It's a constitutional right. So the
6 defendant, even though he's convicted in state court, the
7 Constitution applies to him, the federal Constitution, that's
8 how, in my opinion.

9 MR. SCHORR: I don't see how a federal court, under
10 Apprendi, can take a Maryland statute and say this is no longer
11 a sentencing enhancement, this is now an element of a crime. I
12 don't think Apprendi reaches that far. Apprendi is to the
13 defendant's benefit, but the government is using it to his
14 detriment. They're saying, oh, no, now, this is an element, so
15 now he's an armed career criminal. That is the government's --

16 THE COURT: That was, in essence, Judge Bates'
17 analysis, which was when the government, whether it's the state
18 government or the federal government, is obligated to prove,
19 prove a matter beyond a reasonable doubt to bring it within a
20 statutory proscription, it has become an element of the
21 offense.

22 MR. SCHORR: Again, we have Maryland saying no. So
23 I think if there's any uncertainty --

24 THE COURT: What federal case stands for the
25 proposition that if it is an enhancement, it is not an element

1 of the offense?

2 MR. SCHORR: Well, we've talked about -- I think in
3 my supplemental objections, I talked about the Descamps case.
4 Descamps says that a sentencing court can only make a crime of
5 violence finding on the basis of the elements of the charged
6 offense.

7 What are the elements of robbery?

8 THE COURT: The charged offense is Section 487. If
9 one of the things that has to be proven to get a conviction
10 under 487 is that there was a dangerous -- it was, quote, with
11 a dangerous or deadly weapon, how is that not an element?
12 Doesn't that make charging under 487 superfluous?

13 MR. SCHORR: It's not an element because Maryland
14 courts say it's not an element.

15 THE COURT: No, has Maryland said it's not an
16 element of the offense of dangerous or deadly weapon?

17 MR. SCHORR: Maryland courts have said that 487 is
18 not a separate offense, it's an enhancement. That is what they
19 have said.

20 THE COURT: Okay. Which federal court stands for
21 the proposition that where a state court says that it is an
22 enhancement, it cannot and should not be considered an element
23 of the offense?

24 MR. SCHORR: I haven't found -- well, how about
25 Johnson where they say we have to respect when the state courts

1 define one of the elements of an offense, we're bound by that.

2 Johnson said that. I believe I cited --

3 THE COURT: Johnson, 2015 Johnson?

4 MR. SCHORR: No, 2010.

5 THE COURT: 2010 Johnson.

6 MR. SCHORR: Also, I believe I provided you some
7 Third Circuit cases that say the same thing. We have to follow
8 state court rulings on questions of state law. This is a
9 question of state law. You cannot in a federal court turn this
10 enhancement into an element.

11 I've laid it out as clearly as I can. I don't see
12 where the government has provided you with any authority, and I
13 don't think Judge Bates really provides any valid authority
14 where he has -- a federal court has the authority to do that.

15 THE COURT: The "that" is what?

16 MR. SCHORR: To say, okay, well, Maryland treats
17 this as an enhancement, but for our purposes, we're treating it
18 as an element. That is what we're talking about here. You
19 have to respect what the state courts have said.

20 THE COURT: Ms. King?

21 MS. KING: I just disagree with that. I think
22 Apprendi is clear that any factor that increases the penalty
23 beyond the statutory maximum is an element that needs to be
24 proven beyond a reasonable doubt.

25 THE COURT: It plainly has to be proven beyond a

1 reasonable doubt, the question is is it an element?

2 MS. KING: It is an element, Your Honor, because
3 what else would it be? That's what we have been talking about
4 since Apprendi. That's what all this Johnson, Mathis,
5 everything else that has been happening recently all has to do
6 with elements and what are the elements. So, here, it is
7 charged as the commission of the crime of robbery with a deadly
8 and dangerous weapon. They don't just charge it as a robbery
9 and then later prove that he used a deadly and dangerous
10 weapon. It's charged as such. So, I think -- while Maryland
11 law was adopted from the common law, which was robbery, there
12 was always an increased penalty beyond the maximum that you
13 could get for robbery, there was always an increased penalty
14 for committing armed robbery. And so that was -- from what I
15 can see, it was always charged and always proved that way. And
16 so, if what you're looking as to what Maryland courts do, that
17 is what they do, they treat it as an element.

18 MR. SCHORR: No, they treat it as an enhancement.

19 They say that clearly. I'd like to see the government provide
20 the Court with a case that clearly states that a federal court
21 can do what Judge Bates has done. I don't see where they have
22 the authority to --

23 THE COURT: Other than Judge Bates, that is a whole
24 big circular.

25 MR. SCHORR: Well, I happen to disagree with him --

1 THE COURT: I understand.

2 MR. SCHORR: -- I am sure he's a fine man, but I
3 disagree with his reading.

4 THE COURT: Count One charges a violation of Article
5 27, Section 488.

6 MR. SCHORR: Is that the drug?

7 THE COURT: No. I'm looking at Document 151-1, Page
8 10 of 12. It's the first of the three criminal informations --
9 excuse me, the first of the three criminal informations for
10 robbery is at 151-1, Page 2. Criminal information and Count
11 One charges a violation of Section 488.

12 Count Two charges a violation of 486, which says
13 that Mr. Warren did unlawfully rob the aforesaid complainant
14 and violently did steal from the aforesaid complainant.

15 But Count One charges a violation of 488. It
16 doesn't charge violation of 486 or 487, it charges 488, which
17 reads what?

18 Does anybody have that handy?

19 Matt, can you pull that up, Article 27 of the
20 Maryland Code, Section 488.

21 It doesn't charge a violation of robbery and then
22 some tag along sentencing enhancement.

23 MR. SCHORR: That's how the courts have treated it,
24 Your Honor. I'm not worried about indictments, I'm worried
25 about how the courts have defined the law in Maryland.

1 THE COURT: So, Mr. Schorr, the consequence of your
2 argument, as I understand it, is the Maryland robbery matters
3 simply aren't a qualifying conviction and, therefore, the ACCA
4 doesn't apply?

5 MR. SCHORR: Yes. And it's beyond just because this
6 is an enhancement. Robbery is a far broader definition. Since
7 your tentative findings came out, I find cases which support my
8 position even more. Robbery in Maryland is broadly defined
9 beyond the generic definition of robbery. I argued that in my
10 supplemental objection.

11 I'd like to bring your attention -- there's a case
12 from Maryland's Court of Special Appeals, which is their
13 intermediate appellate court.

14 THE COURT: It's equivalent to our Pennsylvania
15 Superior Court.

16 MR. SCHORR: Fetrow, F-E-T-R-O-W, versus Maryland.
17 It is 847 A.2d, Page 1249. The official reporter was 156 MDAPP
18 675. It is a 2004 case. In there they talk about robbery and
19 putting in fear. They say constructive force is also a part of
20 the spectrum for robbery. You have to have some kind of force.
21 But they say, actual violence is not required, constructive
22 violence, which is present through intimidation, is sufficient.

23 Then they also go on to talk about in that case a
24 Maryland appeals court, which is their Supreme Court case, West
25 versus State. That cite is 539 A.2d 231, 312 Maryland 197. It

1 is a 1988 case.

2 Now, they talk about -- they discuss force. That's
3 what we're talking about here because they talk about physical
4 violence. There has to be physical violence or the threat of
5 physical violence, of bodily injury under the second Johnson.
6 They say there, so long as it is sufficient to compel the
7 victim to part with his property. In other words, sufficient
8 force must be used to overcome resistance. The mere force that
9 is required to take possession when there is not resistance is
10 not enough. They're citing a case called Cooper there.

11 Then they go on to say from two other courts -- from
12 the Maryland Court of Special Appeals, two other decisions talk
13 about a case called Williams v. State. The victim testified
14 that she began screaming from fear when the appellant
15 approached her and that when the appellant grabbed her
16 pocketbook, her bag of money and the pocketbook dropped to the
17 ground, the court held that this was sufficient evidence for
18 the trier of fact to find that the victim resisted and that her
19 resistance had been overcome.

20 That's not violent force. That's not physical
21 force. He grabbed her purse and she screamed. That's a
22 broader definition than the generic robbery.

23 THE COURT: How is that not physical force?

24 MR. SCHORR: It's not the kind that they talk about
25 in Johnson, the Supreme Court talked about in the second

1 Johnson decision. They talk about violent physical force. He
2 grabbed her purse. She dropped it and screamed.

3 Another case they cite, a case called Ratford, where
4 the appellant grabbed the purse off her shoulder.

5 THE COURT: Let me ask you this, Mr. Schorr. That
6 line of reasoning only becomes relevant if I conclude you're
7 correct, that under no circumstances can the requirement for a
8 conviction under 487 for a dangerous or deadly weapon be viewed
9 as an element because if that is an element, then the use of
10 dangerous or deadly weapon categorically makes it a crime of
11 violence under Johnson.

12 MR. SCHORR: If it is an element, but as I've said
13 all morning --

14 THE COURT: I understand. But if I find it is an
15 element for purposes of Alleyne and Descamps and Johnson,
16 Johnson II, 2015 Johnson, then the fact that there are these
17 other robbery issues doesn't matter. But if I find that it's
18 not an element, you're saying it's not a necessary element for
19 the crime of robbery that there be violent force?

20 MR. SCHORR: Right. Nowhere in the Moore
21 decision --

22 THE COURT: I'm not saying it's a perfect analogy,
23 but are you saying in Pennsylvania, aggravated assault is not a
24 separate offense, it is an enhancement to the crime of assault?

25 MR. SCHORR: I don't know what Pennsylvania courts

1 have ruled on that, Your Honor, so I'm not going to shoot from
2 the lip there, I just don't know.

3 THE COURT: Okay. So you're saying without getting
4 into the Giles special appeals dicta from 1970 that says that
5 burning down someone's barn or one threatening to say that you
6 engaged in sodomy would be enough for robbery, which were dicta
7 in both Giles and other cases. You're saying there is a more
8 recent line of cases that say physical contact, short of
9 violence as defined by the Supreme Court, in Maryland would
10 suffice to fulfill the crime of robbery.

11 MR. SCHORR: Yes. And I don't think that the Moore
12 case gives the Giles and the other cases enough respect. Those
13 cases were defining -- Maryland courts defining the scope of
14 robbery.

15 THE COURT: No, because they weren't applied in
16 those cases. Neither case involved threatening to burn
17 someone's house down or threatening to go around town saying
18 they committed sodomy.

19 MR. SCHORR: They are providing guidance on how far
20 that goes.

21 THE COURT: But it's not -- has either case ever
22 been cited for anything in Maryland law?

23 MR. SCHORR: I didn't see -- Your Honor, if they
24 were applicable in this case, I'm sure the government would be
25 saying we have to follow them.

1 THE COURT: Well, yes. Their point is they're not
2 applicable, just as --

3 MR. SCHORR: I'm saying they are. Under these
4 circumstances, it sounds like it's a gray area, you should be
5 really be ruling for Mr. Warren on this.

6 THE COURT: What principle of law says that?

7 MR. SCHORR: The rule of lenity.

8 THE COURT: The rule of lenity is a lot more precise
9 than if it's a gray area, it goes in the favor of defendant.
10 Where there's an ambiguous statute as generally as to the
11 offense of conviction is when the rule of lenity comes in.

12 MR. SCHORR: I haven't had to argue it for a long
13 time, but in this case, I mean we have a disagreement as to the
14 Maryland statute in question. My position is based on Maryland
15 law.

16 THE COURT: Let me ask you this, Mr. Schorr. The
17 two cases that you just cited to and read excerpts into the
18 record -- and I'm asking this question, this is not a gotcha
19 question, I'm just trying to figure out the lay of the land
20 here -- those have not been previously cited by you or the
21 United States in any of the filings in this case?

22 MR. SCHORR: Right. I found these last night.

23 MS. KING: Your Honor, I have cited to Fetrow in my
24 initial response to the defendant's motion.

25 MR. SCHORR: I just can't keep track of everything.

1 THE COURT: There are a lot here.

2 MS. KING: That was before Mr. Schorr was on the
3 case, Your Honor. I was responding to Mr. Sindler's
4 original --

5 THE COURT: His first memo.

6 MS. KING: Yes.

7 THE COURT: Okay, Mr. Schorr, what else do you want
8 to bring to the Court's attention regarding the robbery issues?
9 Since I understand your argument, the Court is definitionally
10 incorrect in its tentative findings in relying and citing to
11 the Section 302, 304 provisions of the Maryland Code. However,
12 the language of 487 appears to be functionally the same, but
13 you're saying whether I read 487 or the statutory provisions
14 cited in the tentative findings, they are not an element of the
15 offense of any crime in the State of Maryland because the
16 Maryland Court of Appeals, Court of Special Appeals, or Supreme
17 Court of Appeals has said it's not an element. The fact that
18 it's a matter that has to be proven beyond a reasonable doubt
19 before it could be applied to any defendant in the courts of
20 Maryland based on Apprendi, is interesting, according to you,
21 but not relevant to the Johnson question that is present here?

22 MR. SCHORR: Yes.

23 THE COURT: And that my tentative findings did not
24 squarely address that. And to the extent that Judge Bates did
25 in Moore, you've noted your due respect, he's wrong.

1 MR. SCHORR: Yes. I don't think Judge Bates even
2 discussed the whole Johnson question about what the Maryland
3 courts say.

4 THE COURT: No, he did, but he came out differently
5 than your argument.

6 And then you say that, therefore, because it's not
7 an element, because federal law says I have to apply state law
8 in making that decision because it's not an element, we're left
9 with the elements of the crime of robbery as set forth in
10 Section 486 at the time Mr. Warren was charged in Maryland.
11 And that even putting Giles and its related case to the side,
12 there are other authoritative cases of decisional courts of
13 Maryland that say that to commit and be convicted of a robbery,
14 one need not either engage in or threaten the level of violence
15 that the Supreme Court in 2015 Johnson has said is necessary
16 for the ACCA to apply.

17 Is that, in essence, the outline of your argument?

18 MR. SCHORR: Yes.

19 THE COURT: Appreciate that, Mr. Schorr. We'll come
20 back to you on other things you want to talk about relative to
21 the tentative findings.

22 Let me just say this to you, Mr. Schorr, and to you
23 Ms. King. Even if I think and even if I thought after some
24 reflection this morning that I know the answer to this, even if
25 I believe I am legally and morally certain that I know the

1 answer to this sitting here, in fairness to the prosecution and
2 to Mr. Warren, I'm not just going to orally announce it. We're
3 going to take a pause in the sentencing hearing and resume it
4 and I'll issue a definitive written ruling on this point.

5 So, Ms. King --

6 Mr. Schorr, I want to assure you of that, and
7 Mr. Warren, you of that.

8 And, Ms. King, you of that.

9 So, Ms. King, I'm happy to hear from you on this
10 segment of the matters, but I recognize that at least as to one
11 of the cases raised by Mr. Schorr, you, unless you have a
12 marvelous mental memory bank, you're not going to know it. So,
13 I recognize you're doing the best you can at this point. But
14 I'm happy to hear from whatever you'd like to tell me right now
15 while it's hot and in front of us.

16 MS. KING: Your Honor, I believe I have addressed
17 this issue extensively in many of my pleadings. I think that
18 Judge Bates' decision is correct. I'm going to take a look at
19 those cases again cited by Mr. Schorr, but I just don't think
20 that his analysis is accurate.

21 THE COURT: Okay. Understood, Ms. King.

22 So, Mr. Schorr, next topic up.

23 Let's see what we don't maybe disagree with.

24 Do you disagree with the Court's conclusion that as
25 to Paragraph 25 of the presentence report, two criminal history

1 points should not be assessed?

2 MR. SCHORR: That's one of the rare ones I have in
3 court, Your Honor, I'm not going to argue with you on that one.

4 THE COURT: Ms. King, is the United States, without
5 waiving any appeal rights, for purposes of this hearing, are
6 you taking any contrary position as to Paragraph 25?

7 MS. KING: I disagree with you, Your Honor.

8 THE COURT: Understood.

9 So, Mr. Schorr, let's take the next one that is
10 perhaps less complicated.

11 The Court applied the upward four-level enhancement
12 or adjustment to the calculation of the advisory guideline
13 range for the weapon involved having an obliterated serial
14 number. The reasoning I used was that I am obligated to
15 accurately do the mathematical calculation of the advisory
16 guidelines. If that calculation results in an advisory
17 sentence that is greater than the statutory maximum sentence,
18 the guidelines themselves say that the guideline sentence
19 becomes the statutory maximum.

20 Let's take this in segments.

21 MR. SCHORR: Did you reverse that, the guideline
22 sentence becomes the statutory maximum, or the statutory
23 maximum --

24 THE COURT: The statutory maximum is the guideline
25 sentence, they match. At that point, they match.

1 As a legal and factual matter, do you believe that
2 the enhanced, the four-level upward enhancement for the firearm
3 having an obliterated serial number should not be part of the
4 Court's mathematical calculation?

5 MR. SCHORR: Could I have a moment to look at all my
6 papers, not all of them but the relevant papers?

7 THE COURT: You may.

8 In short, the Court's ruling was I believe it has to
9 go into the math. What the total math is could be affected if
10 it bumps up against a statutory maximum.

11 MR. SCHORR: Yes, I think that's what I argued,
12 didn't I, in my second supplemental objections, yes.

13 THE COURT: But you don't disagree that the evidence
14 here supports the Court's finding by a fair preponderance of
15 the evidence that the firearm in question had an obliterated
16 serial number and that it comes within that four-level
17 adjustment?

18 MR. SCHORR: I can't argue with that. That's the
19 language of the guidelines.

20 THE COURT: Understood.

21 And then it was an issue raised by Mr. Sindler, and
22 I also ruled on it. There was an objection to the inclusion in
23 the presentence report of the narrative paragraphs related to
24 Mr. Warren's mental and emotional health. The objection filed
25 by Mr. Sindler was that that obviously or inherently came from

1 documentation at Cove Forge, which the defendant had not
2 consented to. The addendum to the presentence report said that
3 it did not come from that because the defendant did not execute
4 an authorization and, in fact, was self-reported by the
5 defendant.

6 Do you have any objection to those paragraphs being
7 included in the PSR?

8 MR. SCHORR: No, Your Honor. I did not understand
9 that objection myself.

10 THE COURT: And then that -- before we get to the
11 two departure motions, I have a feeling you have something to
12 say about the Maryland drug heroin distribution conviction. Or
13 you may not.

14 MR. SCHORR: Well, that's been pretty extensively
15 briefed, Your Honor. It is Mr. Warren's position that if you
16 look at the certified copy of the document, he's not convicted
17 of that section that calls for the higher sentence. I rest on
18 that.

19 THE COURT: Understood.

20 MR. SCHORR: I don't have anything else to say.

21 THE COURT: Understood, sir.

22 So without waiving your position on that as set
23 forth in your sentencing memoranda, the guts of your argument
24 today is, Judge, as a facial matter, your tentative findings
25 are inaccurate because they relate to the section, the section

1 references to the Maryland Code that were not in force at the
2 time Mr. Warren committed the offenses charged in Maryland as
3 robbery, that even if I go to Article 27, Section 486, 87 and
4 88, that as a matter of federal law, applying Maryland law, it
5 is not an element of a crime of armed robbery, if you will,
6 robbery with a deadly or dangerous weapon, and therefore --
7 and, that robbery in itself under Maryland law can be committed
8 and a conviction could be obtained and sustained without proof
9 of the level of violence required by the Supreme Court in 2015
10 Johnson and, therefore, the robbery matters come off the table
11 as underlying convictions for ACCA purposes?

12 MR. SCHORR: Yes, except I think, Your Honor, I
13 would say that there is no crime of armed robbery with a
14 dangerous or deadly weapon in Maryland.

15 THE COURT: Or robbery with a dangerous or deadly
16 weapon. You're saying that is simply not a statutory offense
17 in Maryland?

18 MR. SCHORR: Correct, it's an enhancement.

19 THE COURT: More properly stated, was not a
20 statutory offense in 2000 when Mr. Warren was charged with
21 those offenses.

22 MR. SCHORR: Correct. And I think also, Your Honor,
23 the version of the Maryland statute that you relied on in your
24 tentative findings I think was described as divisible, maybe
25 not by you, but I think under the previous version, it did not

1 have the disclaimer written instrument language in it, so I
2 don't think it was a divisible statute at the time.

3 THE COURT: At the time. It is certainly, in the
4 Court's estimation, is divisible now.

5 MR. SCHORR: Right, because you have separate
6 elements.

7 THE COURT: So the unsettled matter subject to the
8 application of the two departures relating to Mr. Warren's
9 vocational skills and his health situation, that, from your
10 client's perspective, is a game changer, is what you believe to
11 be the facial and reasoned inaccuracy of the Court's tentative
12 findings and rulings on the qualifying offenses related to
13 armed robbery?

14 MR. SCHORR: Yes, sir.

15 THE COURT: Ms. King, what, if anything, would you
16 like to say about any or all of that now?

17 MS. KING: Nothing further, Your Honor.

18 THE COURT: I just thought I would check.

19 MS. KING: Thank you.

20 THE COURT: Mr. Schorr, while we're here, let's talk
21 about the two departures that you've requested.

22 MR. SCHORR: Your Honor, when you look at a
23 defendant who is going to eventually be released into society,
24 Mr. Warren can contribute. Under 5H1.2, I recognize, I sort of
25 turned that guideline on its head when I made this argument,

1 but he should be able to get out in time that he can support
2 himself and he can work as a plumber, assuming he gets his hips
3 replaced and everything else is treated. But he's 36 years old
4 now. By the time he gets out of prison he'll be closer to 50.
5 Prison life is hard. He'll be physically debilitated. He has
6 diabetes. So he would be at the mercy of the state and a ward
7 of the state, basically, in terms of need to be on Public
8 Assistance. But he can support himself if he gets his health
9 issues taken care of, so for those reasons a variance, I ask
10 under 5H1.2, that he's able to take care of himself if he's
11 back out on the street and medically taken care of.

12 THE COURT: Mr. Schorr, I'm not being picky when I
13 say this, I'm only -- I am being picky, but not in a
14 deprecating fashion, at least not intended. You just used the
15 term "variance." Are you asking me to consider the fact of
16 Mr. Warren's vocation and training as a plumber as I consider
17 the 3553(a) factors, or are you asking that I, in essence,
18 recalculate the advisory guideline range using a departure?

19 MR. SCHORR: I think I'm asking for a variance, Your
20 Honor.

21 THE COURT: I expressly related in the tentative
22 findings that we would hear and you were not limited in any
23 argument under the sentencing factors regarding his vocational
24 training and skills and its impact that it should have on
25 sentencing and re-entry into society. So to the extent your

1 sentencing memo asked for, moved for a departure under that
2 provision, can I treat that as being withdrawn without
3 prejudice?

4 MR. SCHORR: Yes. Maybe call it a variance instead.

5 THE COURT: I will treat as withdrawn, without
6 prejudice, any motion for a departure under Section 5H1.2 of
7 the guidelines without prejudice to the ability of the
8 defendant or the United States to reference those matters in
9 application of the sentencing factors.

10 That brings us to 5H1.4 where your sentencing memo
11 seemed to move for a downward departure, that is, a
12 recalculation of the advisory guidelines based on Mr. Warren's
13 physical condition.

14 MR. SCHORR: Let's treat that as a request for a
15 variance also, Your Honor.

16 THE COURT: So I can treat that motion as withdrawn
17 without prejudice on the same basis?

18 MR. SCHORR: Yes, sir. In both instances we just
19 discussed, I'm asking for a variance.

20 THE COURT: Understood.

21 Ms. King, does the United States have any objection
22 to the Court treating those, to the extent they were motions
23 for departure, treat them as being withdrawn without prejudice
24 to the ability of either the United States or the defendant to
25 make reference to those matters relative to the sentencing

1 factors?

2 MS. KING: No, Your Honor.

3 THE COURT: Without objection, that's what we'll do.

4 We'll do that as a text order treating them in that
5 way.

6 So then that leaves essentially two items.

7 Mr. Schorr, are you resting on your papers and
8 arguments previously made regarding the Maryland heroin
9 distribution matter, at least that's how the Court referenced
10 it in its tentative findings, and the matters you raised
11 regarding the robbery?

12 MR. SCHORR: Yes. And on the robbery, what we
13 discussed today.

14 THE COURT: Understood.

15 That's beyond the papers, it's the matters you
16 specifically raised today as objections to the Court's
17 tentative findings.

18 Ms. King, let me ask you this.

19 How do you believe, given the Court's prior
20 statement, which I'm not changing because it is something I do
21 think I'm right on, and that is, I'm not going to orally rule
22 because I want to go back and look at these things, among the
23 options, it appears to the Court of what we could do, are the
24 following.

25 I could recess the sentencing hearing, to be

1 reconvened as promptly as is possible on the calendars of
2 counsel, after the Court has specifically ruled on whether it
3 is going to amend or modify its tentative findings, and if so,
4 how. And I think we would do that relatively promptly, I'm not
5 going to do it today, but we would do it relatively promptly.

6 I was going to say I'm hesitant to suggest this, but
7 I'm not because this is a vitally important matter, both for
8 the United States and for Mr. Warren.

9 I recognize there's been a lot of paper, Mr. Schorr
10 or Ms. King, do you want to file any supplemental document
11 relative to the issues that were raised in open court today?
12 There's no wrong answer to that from the Court's perspective.
13 I literally want to make sure the advocates have the
14 opportunity they think is the right way to go for the Court
15 to -- before the Court rules on whether it will modify its
16 tentative findings.

17 Ms. King, what would you like to do?

18 MS. KING: I don't believe I need to file anything
19 further, Your Honor.

20 THE COURT: Mr. Schorr, sir?

21 MR. SCHORR: Well, Your Honor, I think what I'd
22 rather do is after you issue your tentative findings, maybe
23 file written objections to them. To be quite honest, I was
24 flying by the seat of my pants when I found these two cases
25 last night.

1 THE COURT: I understand that, Mr. Schorr. Again,
2 my observation here isn't critical, but I do think one of the
3 directions regarding sentencing matters that I'm comfortable is
4 pretty clear from the Supreme Court and the Third Circuit,
5 particularly since Molina-Menendez came down from the Supreme
6 Court in June, April of this year, and then the decision of our
7 Court of Appeals a year and a half ago, and I apologize, I
8 don't recall the name of it, that said at the time that any
9 objection to the procedural reasonableness of the sentence not
10 made at the sentencing hearing is waived, or would be in the
11 ordinary course deemed waived. And the reason the Court of
12 Appeals, one of the reasons they articulated was raise them
13 while you're in front of a judge so that she or he can fix it.

14 I think if there's something you want to say, it
15 doesn't mean that Ms. King may not have objections to what my
16 ultimate rulings are or you might not have objections, but to
17 the extent there are these objections, we ought to get them
18 front and center right now and address them. So if that means
19 you believe you might like to file a supplemental memo, I'm
20 going to let you do it, just as I would let Ms. King do it.

21 MR. SCHORR: I may do that, Your Honor, within the
22 next few days.

23 THE COURT: When you say the "next few days," what
24 do you mean?

25 MR. SCHORR: How about by Tuesday?

1 THE COURT: Well --

2 MR. SCHORR: You want it earlier?

3 THE COURT: I'd like to, if I can.

4 MR. SCHORR: I'll shoot for tomorrow.

5 THE COURT: End of the day tomorrow?

6 MR. SCHORR: Yes.

7 THE COURT: Ms. King, if you change your mind and
8 there's something you'd like to file by the end of the day
9 tomorrow, you're welcome to.

10 MS. KING: Thank you, Your Honor.

11 THE COURT: If either of you see in what the other
12 team filed something that you just believe you are compelled to
13 put on the record, if you could file it by the end of the day
14 Monday.

15 Can you live with that, Mr. Schorr?

16 MR. SCHORR: I can live with it, Your Honor.

17 THE COURT: Ms. King, can you live with it?

18 MS. KING: Yes, Your Honor.

19 THE COURT: I know it's not perfect, I was a
20 practicing lawyer, but if you can live with that -- I know it's
21 a low bar -- and then I will either -- I will issue something.
22 It may say I've thought about all this, and I think I was right
23 in my tentative findings and here's why, or that I was right in
24 my conclusion, but I need to correct some statements in my
25 tentative findings, I might do that, or if I believe that

1 there's showing that is different, then I'll address that.
2 We'll go with that.

3 In terms of sentencing factors that would either
4 change the calculation of the now advisory guidelines or affect
5 whether or not Mr. Warren, for sentencing purposes, is
6 considered an armed career criminal, are there any other
7 matters that need to go on the record now, Mr. Schorr, or have
8 we now addressed them all, one way or the other?

9 MR. SCHORR: I think we've addressed them all, Your
10 Honor.

11 THE COURT: That was my thought, but I was checking.
12 Ms. King, same question of you.

13 MS. KING: Your Honor, if the Court -- I do think
14 that the Court should apply the two points for the 2003 assault
15 conviction.

16 THE COURT: Understood.

17 MS. KING: I do think that that would change the
18 ultimate calculation.

19 THE COURT: It does. It changes the Criminal
20 History Category from V to VI, which results in a different
21 portion of the sentencing table applying, there's no question.

22 MS. KING: I would just point out that the
23 government is fully aware and respects the need for counsel at
24 all points of a proceeding, however, the cases cited by the
25 Court in its tentative findings relative to the search and

1 inquiry that must be done is really with respect to when the
2 defendant is actually waiving his right to counsel and does he
3 understand what he or she is doing and moving forward pro se or
4 with standby counsel, is the defendant aware of all his rights
5 and everything else. Here, we have a case where the defendant
6 was convicted 13 years ago, never challenged that conviction,
7 to the government's knowledge, and as a result, a presumption
8 of regularity attaches to that conviction. As the Third
9 Circuit held in Jones, the defendant has to overcome the burden
10 of the presumption of regularity and I don't think he's done
11 that here. It's not the government's burden to prove he didn't
12 have counsel, he has to overcome the burden that he has, which
13 is this is a regular conviction and we're going to assume you
14 had counsel. The time that he was advised that he needed to
15 get counsel was at a preliminary stage of that case, it was not
16 at the time that he was convicted and sentenced in that case.
17 So, I agree that the record is not clear whether he eventually
18 received counsel or not, however, he was appointed a public
19 defender in each of his other cases, and there's no reason to
20 think that this 2003 conviction was anything else.

21 Frankly, he's never even alleged that he didn't have
22 counsel. He's alleged that he doesn't remember. I did cite
23 some cases in my response where other Courts in this building,
24 as well as the Third Circuit, have said that is not sufficient.
25 While I respect the Court's position, I just need to put my

1 position on the record because it does change the guidelines
2 dramatically.

3 THE COURT: I understand, Ms. King. And I'll assure
4 you, Ms. King, and you, Mr. Schorr, and I hope this applies for
5 as long as I still have this job and each of you have your
6 jobs, disagreeing with me when the law or facts require you to
7 disagree with me, from this Court's estimation, is you doing
8 your job. And I do not take it as any lack of respect or
9 anything else. In fact, it would be dismayed if either the
10 United States, through you, Ms. King, Mr. Schorr, or Mr.
11 Warren, or one of your other clients thought I was off base
12 legally or factually if you didn't disagree with me.

13 I will say, and this is not meant to be critical to
14 the courts or the State of Maryland, I did find the records on
15 this point murky, and that might be a bit charitable. I will
16 say on the record, that influenced my ruling. I recognize the
17 presumption of regularity, but under both Curtis and Napolitan,
18 our Court of Appeals and the Supreme Court have said the one
19 thing that can be fairly up on the table when this Court, a
20 federal trial court is considering the implications for
21 guideline purposes or sentencing purposes of a prior conviction
22 is whether or not the defendant was represented by counsel or
23 can be deemed to have fairly and appropriately waived it. It
24 does seem to the Court that whether -- I know it's not the rule
25 of lenity, but when the records are as murky as they were here,

1 I believed it was appropriate to -- that that murkiness results
2 in the points not being assessed. I just did not have the
3 requisite level of confidence in the regularity of the
4 proceedings, and there's nothing you can do about it, Ms. King,
5 or Mr. Schorr, given the passage of time and the distance and
6 everything else, that I knew that Mr. Warren either had a
7 lawyer or had knowingly and consciously foregone the right to
8 have a lawyer at a critical stage of the proceeding.

9 So I understand the position of the United States.
10 Ms. King, I'll think about it some more, in fairness to the
11 position, but that really was what was animating my ruling in
12 that regard, that the records were so murky, and this is such a
13 central and vital issue, so central and vital that the Supreme
14 Court and the circuits have said it can be fairly up on the
15 table for these purposes that I ruled on the way I did. But I
16 will think about it further in light of the positions both you
17 and Mr. Schorr have taken.

18 MS. KING: Thank you.

19 MR. SCHORR: I'd like to point out, Your Honor, the
20 government has repeatedly said Mr. Warren has never said he
21 didn't have a lawyer. He did say that in Document 191, Page 4:
22 Warren was not represented by counsel during his 2003 assault
23 conviction.

24 It's out there now.

25 THE COURT: In fairness, I think what Ms. King was

1 saying, Mr. Warren did speak at the May 10, 2016 hearing and
2 she did not recall him affirmatively stating, I did not have a
3 lawyer.

4 MR. SCHORR: Through his lawyer --

5 THE COURT: Is that fair, Ms. King?

6 MS. KING: Yes, Your Honor.

7 MR. SCHORR: Through his lawyer, he's saying it now.

8 THE COURT: I understand that.

9 MR. SCHORR: I think that's all I have at this
10 point, Your Honor.

11 THE COURT: Mr. Greer, we'll do a text order that
12 resolves the two motions for departures and confirms the
13 briefing schedule that we talked about in court today.

14 Mr. Warren, I'm confident based on our interactions
15 in court that you understand what is happening here, but just
16 to confirm it, since you're not a lawyer, what I've heard from
17 your lawyer and the lawyer from the United States are all the
18 matters that go into calculating what the statutory and
19 guideline ranges of sentences are in your case. The United
20 States has taken the position that I should count the two
21 points for guideline calculation purposes for the assault
22 conviction that we have been referencing. Your lawyer, in
23 writing, has reaffirmed today that the Court should not count
24 for armed career criminal purposes the drug conviction in
25 Maryland that I've referred to in my documents as the Maryland

1 heroin conviction.

2 We've had both the writings and the arguments today
3 that your robbery convictions based on your guilty pleas in
4 Maryland should not count for armed career criminal purposes.

5 Because all of those matters go to the calculation
6 of what your statutory sentence would be, and the impact of the
7 calculation of the advisory guidelines, we've addressed them
8 all today, I'm not ruling on them at this time, I'm going to
9 consider them. I have given your lawyer and the lawyer for the
10 United States opportunities to file one more round of papers in
11 writing in those regards. Once I review those, I will issue
12 the appropriate findings, and then we will promptly set your
13 sentencing hearing after that. The intent here is not to
14 unduly delay things, but the intent of the Court is to make
15 sure the lawyer for the United States and your lawyer have had
16 the most complete opportunity to state their positions and then
17 that my determination is as accurate as I think I can make it.

18 Do you understand that, sir?

19 THE DEFENDANT: Yes, I understand that.

20 THE COURT: Do you have any questions you want to
21 ask me about the procedure of what we're doing here?

22 THE DEFENDANT: I wanted to confer with my lawyer
23 for one second.

24 THE COURT: You may.

25 (Pause in the proceedings.)

1 THE COURT: Mr. Warren, anything you'd like to ask
2 me.

3 THE DEFENDANT: Yes, on advice of my counsel, he
4 said I should address this myself.

5 THE COURT: Okay.

6 THE DEFENDANT: The 2002 robbery conviction, I was
7 represented by Marc Zayon out of Baltimore, Maryland, out of
8 the law offices of Walker and Zayon. I took a plea on this in
9 the middle of trial under the advisement of my attorney. The
10 plea's contention of ten years, seven years suspended, three
11 years probation, once I complete my probation, which was four
12 years, the robbery convictions would be wiped away. Some kind
13 of clerical error occurred, and my lawyer takes full
14 responsibility for it. I had letters and proof that he
15 contacted the judge and said it was on his behalf that these
16 convictions are still on my record. I would have never be in
17 this position, at that time if my lawyer would have did what he
18 was supposed to do at the time. I never pled to using a weapon
19 during the course of any robbery. I think that's the point
20 that was made by Judge Bates in the case that -- out of the
21 circuit. I would like to say that case is not a precedent
22 case, it's not binding. And I think that's pretty much it,
23 Your Honor.

24 THE COURT: Thank you, Mr. Warren.

25 Mr. Schorr, assuming for purposes of these matters

1 here I credit, and I'm not ruling one way or the other, but if
2 I would credit what Mr. Warren just told me, not about the
3 legal impact of Moore because that stands on its own, but what
4 he said happened in those robbery convictions, what, if
5 anything, do you believe that has to do with the sentencing
6 issues here?

7 MR. SCHORR: Well, if he pled to simple robbery, he
8 didn't plead to the enhancement or didn't plead -- he would not
9 be an armed career criminal.

10 THE COURT: I understand. But I'm bound by the
11 certified records from the Maryland court, correct?

12 MR. SCHORR: Yes.

13 THE COURT: So, if what Mr. Warren just said is at
14 variance from those records that are in the docket here, what
15 impact, if any, does that have on the proceedings in
16 Mr. Warren's case here?

17 MR. SCHORR: Offhand, I don't know. I don't
18 think -- we're kind of locked in with what is certified from
19 the record.

20 THE COURT: That was my understanding under both
21 Napolitan and Curtis, but I wanted to see if you had any
22 different thought.

23 MR. SCHORR: He's stuck, basically, which is why
24 we're fighting so hard on this.

25 THE COURT: Ms. King, same question of you. If I

1 were to credit --

2 And Mr. Warren, when I phrase it that way, I'm not
3 making a ruling whether I believe you or not.

4 I'm asking if I assume that what you say is true,
5 what impact, if any, does that have on the sentencing
6 proceedings in this case?

7 MS. KING: None.

8 THE COURT: Because of Curtis and Napolitan, among
9 others?

10 MS. KING: Yes, this is not the appropriate forum to
11 challenge that conviction.

12 THE COURT: Understood.

13 Mr. Schorr, anything else you believe we should take
14 up today, sir?

15 MR. SCHORR: No, sir.

16 THE COURT: Ms. King, same question of you?

17 MS. KING: No, unless we're going to schedule the
18 sentencing, Your Honor.

19 THE COURT: Mr. Babik will be in touch with each of
20 you. We'll make sure that it is a date that does three things;
21 it's available on the Court's calendar; it's as prompt as is
22 reasonably possible; and it is also when you, Mr. Schorr and
23 you Ms. King are available.

24 MS. KING: Thank you.

25 THE COURT: So it will fit all three of those

1 requirements.

2 MR. SCHORR: Thank you, Your Honor.

3 THE COURT: Mr. Babik, is there anything else that
4 you had notes that we wanted to take up here?

5 MR. BABIK: Nothing else, Judge.

6 THE COURT: Mr. Greer, same question of you?

7 MR. GREER: Nothing, Judge.

8 THE COURT: In a moment, I'll ask Mr. Babik to
9 adjourn the Court. I'd ask those present in the courtroom to
10 remain seated and at ease while the marshals assist Mr. Warren.

11 Mr. Schorr, Ms. King, to the extent an error in my
12 tentative findings made these proceedings more complicated, I
13 apologize. We'll fix it and get it right. To the extent
14 they're more complicated for other reasons, I didn't have
15 anything to do with those, but we are where we are.

16 The marshals can assist Mr. Warren.

17 (Court adjourned.)

18 -----

19 CERTIFICATE

21 I, Juliann A. Kienzle, certify that the foregoing is
22 a correct transcript from the record of proceedings in the
above-titled matter.

23 s/Juliann A. Kienzle, RMR, CRR

24 Juliann A. Kienzle, RMR, CRR

25